expansion if the move predominantly results in adding channels over which the operator has no control.

SCBA has submitted detailed analyses demonstrating how the leased access rules impose disparately harsh burdens on small cable, burdens that create such a competitive imbalance as to create a restraint on its ability to expand services.[42] SCBA has also shown how the recently promulgated regulations needlessly impose a $24 million compliance burden,[43] further taxing the resources of small cable. The Commission should tailor leased access requirements that will not result in requirements that will cripple small cable financially or competitively.

3. Absence of meaningful interconnection requirements.

A LEC that avoids interconnection with its facilities maintains its monopoly. LECs have shown strong staying power against large cable operators seeking to interconnect.[44] If the largest cable operators have such difficulty, small operators do not stand a chance.

Incumbent LECs use various stall tactics to force a small operator requesting interconnection to incur substantial costs merely talking about interconnection. Standard tactics experienced by SCBA members include failing to respond timely to bona fide requests, changing contact persons periodically, effectively forcing recommencement of the process, etc. These tactics evidence attempts to wage a war of financial attrition -- a war that small cable does not have the finances to wage.

Congress sought to level the playing field by not only requiring interconnection as part of the Act, but also by ensuring that interconnection be provided on fair terms. A separate Commission

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[42]*Id.*

[43]SCBA *Comments* at 28.

[44]Consider the recent prolonged battles between Time Warner Cable and Ameritech in Ohio.

rulemaking involves crafting regulations governing interconnections.[45] SCBA strongly urged the Commission of the need for strong national standards, including special provisions governing small cable interconnection.[46] Absent such strong and special provisions, LECs will retain their ability to easily throw up insurmountable barriers for small cable.

SCBA has also expressed concern about the ability of certain rural telephone providers to escape the requirements of providing interconnection under regulated terms and conditions. The Commission must promulgate narrowly tailored exemptions for certain rural telephone providers. If the regulations are not narrowly tailored, many rural telephone companies will effectively prevent small cable from providing competitive telephone service.

4. Absence of conduit access.

Because many small cable systems operate in rural areas where aerial plant predominates, access to utility poles represents an essential element of providing cable service. Inability to access poles on economically feasible terms represents a significant barrier to entry.

Small cable faces two types of pole attachment/conduit barriers. The first arises from entities who are often direct competitors to cable but yet completely unregulated with respect to the terms and conditions of attachments -- rural telephone and electric co-operatives. The second arises from terms and conditions charged by those subject to regulation.

The terms and conditions imposed by rural co-operatives are exempt from federal oversight.[47] They are generally not regulated by state utility commissions. Scores of SCBA members have

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[45]CC Docket No. 96-98.

[46]SCBA *Comments* are enclosed behind Tab "H".

[47]47 U.S.C. § 224(a)(1).

incurred double and triple digit percentage increases in pole attachment costs at the same time the pole owners market DBS services to their members. Some co-operatives have raised rates in excess of 1,000% and openly admit their intent to give their DBS services a price advantage. Such predacious pricing of an essential element for small cable constitutes a significant impediment to retaining existing market presence and expanding service into new markets.[48]

III. THE COMMISSION MUST COMPLY WITH THE SMALL BUSINESS ACT

The Commission Attempts to Define a Small Company in This Rulemaking.

Congress required this Commission to identify barriers to entry for "small businesses".[49] It left to the Commission the task of determining what constituted a "small businesses". These determinations will significantly impact the scope of the Commission's review and, consequently, the number of affected small cable companies.

A. The Small Business Act applies to this proceeding.

The Small Business Act ("SBA") defines a small business as one which is: (1) independently owned and operated; and (2) not dominant in its field of operation.[50] The Commission has generally determined that both cable television operators and telephone companies were not subject to the provisions of the Small Business Act because they were in many cases the exclusive provider of services, and if not exclusive, at least dominant.[51]

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[48]SCBA *Comments* filed to date can be found behind Tab "H" at 21.

[49]Act at §257(a).

[50]15 U.S.C. §632(a).

[51]*See, e.g., Report and Order,* In the Matter of Regulation of Small Telephone Companies, CC Docket No. 86-467 (Released June 29, 1987), 2 FCC Rcd. Vol. 13 3811 at 3815 and *Small System Order* at ¶49.

Historically, the Commission has consistently made the determination of dominance at the local level. In this rulemaking, Congress refers to a company size standard measured at the national level. Because the cable industry on a national level is dominated by a few large MSOs[52], the cable operators potentially impacted by the definition of a "small business" are simply not dominant when viewed on a national basis.

The analysis employed by the Commission in the *Small System Order* concluding that the SBA did not apply to that rulemaking is easily distinguished from this rulemaking. In the *Small System Order*, the Commission determined that the SBA did not apply for two reasons. First, as part of the 1992 Cable Act, Congress established a size standard (i.e., fewer than 1,000 subscribers) that precluded application of SBA. The Commission reasoned that providing relief to a greater population of operators than required by statute did not invoke the SBA. Second, the Commission reasoned that "[c]able systems subject to rate regulation are by definition dominant in their field of operation because they do not face effective competition."[53] In this rulemaking, Congress did not establish a size standard. Further, Congress focused the company size standard at the national level where small cable has no dominance. Consequently, the provisions of SBA apply to this rulemaking.

B. The Commission must seek approval of size standards from the Administrator of the Small Business Administration.

The 1992 amendments to the SBA require that when the Commission promulgates any regulation defining a small business, the following procedures must be followed:

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[52]As of December 31, 1995, the eighteen largest MSOs each had more than 617,000 subscribers. These MSOs provided service to approximately 51 million subscribers, or 83% of the national subscribers. National Cable Television Association, *Cable Television Developments*, Spring 1996 ed. at 14.

[53]*Small System Order* at ¶ 49.

> [T]he head of a Federal Agency may not prescribe for the use of such...agency a size standard for categorizing a business concern as a small business concern, unless such proposed size standard
>
> A. is being proposed after an opportunity for public notice and comment;
>
> B. provides for determining, over a period of not less than 3 years...the size of a concern providing services on the basis of the average gross receipts.
>
> C. is approved by the Administrator [of the Small Business Administration].[54]

In this rulemaking, the Commission is establishing a size standard that has not been established by Congress. Simply because Congress mandated that the agency undertake the task does not relieve the Commission from complying with the SBA.

The Commission must proceed with notice and comment rulemaking to develop data regarding the appropriate small business definitions for all industries. The Commission cannot make the determination in isolation. It must seek the approval of its standard by the Administrator of the Small Business Administration

IV. CONCLUSION

The Congressional mandate to remove barriers to entry is clear. SCBA has identified in this and other concurrent rulemakings various barriers to entry that the Commission should remove. SCBA urges the Commission to remove these barriers to allow small cable to carry out the

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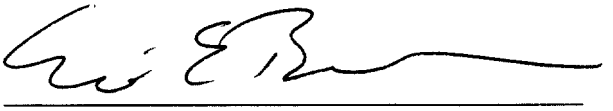
[54] 15 U.S.C. §632(a)(2).

competitive goals established by Congress. SCBA and its members are prepared to provide the Commission with any additional information it may need as it proceeds with this rulemaking.

Respectfully submitted,



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July 24, 1996
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Exhibit A

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In re Applications of	)	
	)	
THE WALT DISNEY COMPANY, Transferor,	)	BTCCT-950823KF-LJ
	)	
and	)	
	)	
CAPITAL CITIES/ABC, INC., Transferor,	)	
	)	
and	)	
	)	
THE WALT DISNEY COMPANY, Transferee	)	
	)	
Transfer of Control of the broadcast licenses of Corporation Holding Broadcast Station License KCAL-TV to the Walt Disney Company and the Transfer of Control of the broadcast licenses held by Capital Cities/ABC to the Walt Disney Company	)	

PETITION TO DENY

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September 27, 1995

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SUMMARY

The Small Cable Business Association ("SCBA"), a grass-roots, self-help organization of over 350 small operators of small cable systems nationally, petitions to deny the transfer of control of the broadcast licenses held by Capital Cities/ABC, Inc. ("Cap Cities/ABC") and by the Walt Disney Company ("Disney") to a proposed combined entity.

Both Cap Cities/ABC and Disney as the sellers of national cable television programming and, with respect to Cap Cities/ABC, the sellers of off-air broadcast programming, have consistently used their market power to deal unfairly with small cable operators. For example, Cap Cities/ABC has charged smaller operators rates 30% to 60% higher for national cable television programming services. Both Cap Cities/ABC and Disney have repeatedly refused to sell programming to a buying co-operative at rates afforded larger companies[1] The conduct has also included tying the grant of retransmission consent to small cable systems to the addition of new cable programming such as ESPN2 by the systems. Such additions of new channels can place economic burdens on small cable systems and their subscribers. Also, because small cable systems are often not technologically able to offer a greater number of channels, those systems must forego carriage of the broadcast signal entirely, resulting in loss, for all practical purposes, of that subscriber's ability to view the signal.

As a vertically and horizontally integrated media giant, the proposed transferee will have vastly greater market power. Through its increased ownership of cable television

[1]Of the six companies identified by SCBA as, in its opinion, failing to deal with a buying co-operative, four are owned by Cap Cities/ABC and Disney.

programming sources, the proposed transferee can, and likely will, impose even greater burdens on small operators during the next round of retransmission consent negotiations which must be completed by October 6, 1996. The resulting adverse impact on small operators and their subscribers will be significant and clearly not in the public interest or convenience.

The merger will combine significant programming holdings with significant broadcast distribution holdings. The CEO of one of the cable programmers has already admitted that "joint maneuvering" of commonly controlled channels when dealing with cable systems is being examined as a post-merger strategy. The combined entity will continue to seek maximization of its economic interests in cable programming, even at the risk of viewership declines in the broadcast business[2]. Subordination of its interest as a broadcaster in fulfilling its local interest obligations to a growing programming empire is contrary to the licensee's obligation under 47 U.S.C. Section 310 and must cause the Commission to deny the requested transfer.

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[2]If Cap Cities/ABC continues with national policies requiring purchase of its cable programming networks in return for retransmission consent, so long as the vast majority of cable systems capitulate to this national scheme, Cap Cities/ABC will earn greater revenue from its new cable services than it loses in the markets where its broadcast signal is removed from the cable system.

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Transferor,	)	
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THE WALT DISNEY COMPANY,	)	
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Transfer of Control of the broadcast licenses of Corporation Holding Broadcast Station License KCAL-TV to the Walt Disney Company and the Transfer of Control of the broadcast licenses held by Capital Cities/ABC to the Walt Disney Company.	)	

PETITION TO DENY

The Small Cable Business Association ("SCBA"), through counsel, hereby petitions to deny the application of pre-merger The Walt Disney Company and pre-merger Capital Cities/ABC, Inc. ("Cap Cities/ABC"), for consent to transfer control of broadcast station

licenses held by each pre-merger entity to the newly-formed post-merger The Walt Disney Company ("Disney").

I. PETITIONERS ARE PARTIES IN INTEREST

SCBA is a trade association representing over 350 small providers of cable television services. Members of the Association operate small cable systems and/or small cable companies across the United States. The majority of SCBA's members have fewer than 1,000 subscribers in total. SCBA was formed in May of 1993 to represent the collective interests of its members and to speak with a unified voice on their behalf to issues affecting their economic interests. The SCBA regularly represents the interests of its members in Commission proceedings to promote the particular concerns of small cable operators and to ensure that the economic interests of its members are not adversely impacted by Commission decisions. Likelihood of financial injury is sufficient to confer standing upon SCBA as a party-in-interest for purposes of 47 U.S.C. Section 309(d)[3]. For the reasons set forth in this Petition, and as attested to in the Declaration attached to this Petition, the Petitioner and its members fulfill the requirements of Section 309(d)(1), as small cable businesses that would suffer severe economic injury if the application for transfer of broadcast licenses is granted.

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[3]*FCC v. Sanders Brothers Radio Station* (1940) 309 U.S. 470, 60 S.Ct. 693, 84 L.Ed. 869.

II. APPLICABLE STANDARD

Under Section 310(d) of the Communications Act of 1934, as amended, the Commission cannot approve a transfer of control of licenses unless it finds that the public interest would be served. 47 U.S.C. §310(d). If a transfer is detrimental to the public interest, the applicants must show that there are offsetting benefits that swing the balance of the grant of transfer. In determining whether there are detriments, we believe that there are three main areas to be examined:

(1) What is the effect of the transfer on small cable systems and their subscribers?

(2) Does the increase of market power that will result in lessened distribution of local broadcast signals on small cable systems create a deficiency in the transferee's service of the local public interest?

(3) Does the concentration of significant producers of programming with the ownership of broadcast distribution facilities further the goal of diversity of control of the mass media as has historically been sought by this Commission?

SCBA stresses this point: The merger will result in a concentration of mass media programming and broadcast power that will place well beyond small cable television operators -- the operators of over two-thirds of the cable systems in the U.S. -- the ability to fairly negotiate equitable terms for consent to retransmit the broadcast signals of the proposed transferee. The public interest cannot be served by this monopolistic concentration.

III. THE REQUESTED TRANSFER IS NOT IN THE PUBLIC INTEREST CONVENIENCE AND NECESSITY AND MUST BE DENIED

A. The Proposed Transfer Will Place the Licenses Under The Control Of A Media Giant With Sufficient Market Power Over Small Cable Operators To Hold Retransmission Consent Hostage By Mandating Carriage Of National Cable Programming Services Owned By The Proposed Transferee Resulting In Either Higher Costs For Cable Subscribers Or Loss Of Broadcast Signal Dissemination Through Local Cable Systems.

1. The Proposed Transferee Will Be The Largest Media Company In The World.

The post-merger entity to which the licenses are to be transferred will create the largest media company in the world[4]. Warren Buffet, Cap Cities/ABC's biggest shareholder declared the merger as "a marriage of the No. 1 content company in the world with the No. 1 distribution system."

a. Programming Services

The combined entity will control numerous programming interests. In addition to the ABC network, it will control major movie studios including Walt Disney Pictures, Touchstone Pictures, Hollywood Pictures, and Miramax Films. The combined entity will also hold interests in several major cable programming services including:

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[4]*Multichannel News*, August 7, 1995, at 1.

Cable Programming Network	Ownership[5]	No. Cable Households[6]	% of Cable Households
ESPN	80% Cap Cities/ABC	64.5 Million	100%[7]
ESPN2	80% Cap Cities/ABC	18 Million	31%
Arts & Entertainment (A&E)	37.5% Cap Cities/ABC	56 Million	97%
Lifetime	50% Cap Cities/ABC	59 Million	100%
Disney Channel	100% Disney	7.7 Million	13%

These services reach a large percentage of cable homes. In addition, plans are reportedly in the works for new service launches including "Lifetime Too"[8] and "ESPN3" as well as a number of other unnamed ESPN services[9]. Industry analysts have widely speculated as to the ways in which the combined entity will use its broad spectrum power and positioning to maximize the value of all products via cross-promotion or "joint maneuvering"[10].

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[5]*Multichannel News International*, October 3, 1994 at 20.

[6]*Complete Cable Book*, Homily Press, 1995.

[7]According to data published by Paul Kagan Associates, Inc., there are 57.9 million basic cable households. Consequently, SCBA assumes that ESPN is available on every cable system as part of the basic tier package.

[8]*Multichannel News*, August 7, 1995 at 18.

[9]*Id* at 48.

[10]ESPN president and CEO Steven Bornstein is quoted as stating that "joint maneuvering" of all channels, in terms of affiliate sales (i.e., sales to cable systems), "is a reasonable issue to be addressed". *Multichannel News*, August 7, 1995 at 48.

b. Broadcast Outlets

The combined entity will control 10 television broadcast stations that reach 25% of television households in the United States[11]. Despite its tremendous reach, the Commission should not be mislead. Although located in some of the largest television markets in the country, the stations serve Arbitron Areas of Dominant Influence ("ADIs") which reach well into less densely populated areas, including rural California, Illinois, Indiana, Pennsylvania, New York, North Carolina, Tennessee, Texas, and others -- many areas served by small cable operators. The viewers of these broadcast properties include many who live in more rural areas.

2. Two-Thirds Of Cable Systems In the U.S. Have Been Determined By This Commission To Be "Small".

In stark contrast to the media giant being created are small cable television operators. According to the definitions promulgated by this Commission, two thirds of the cable systems in the U.S. are small systems operated by small companies[12]. The Commission recognized that the economic health of these companies is important to the public interest[13]. These small systems are solely dependent on the providers of cable programming services for products expected by subscribers such as ESPN, Lifetime and Disney. There are no alternative sources for this programming.

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[11] *Cable World*, August 7, 1995 at 1.

[12] *Sixth Report and Order, Eleventh Order on Reconsideration*, MM Docket 92-266 (released June 5, 1995) at Par. 33.

[13] *Id* at Par. 3.

Similarly, the owned and operated stations of the combined entity, while only 10 in number, serve a huge percent of the U.S. television households (25%). Again, under the provisions of 47 U.S.C. Section 325, cable operators may be required to obtain the consent of the broadcaster in order to retransmit the broadcast signal over its cable system[14] . The Commission has adopted a "hands off" policy, refusing to regulate retransmission consent agreements, deferring to market forces to govern these agreements. Unfortunately, as set forth in this *Petition*, the vast difference in bargaining power between the combined entity and small operators leaves small operators unprotected from abuse. This demonstrated potential for abuse threatens the economic and operational viability of small cable operators. The public interest will suffer.

3. The Parties Have Already Demonstrated Disparate and Harsh Treatment Of Small Operators.

a. Cap Cities/ABC Has Required Tying Agreements.

In the first round of retransmission consent agreements that became effective October 6, 1993, the owned and operated stations of Cap Cities/ABC required, as a condition of granting retransmission consent, that operators agree to the carriage of ESPN2 (at the time a new service) at rates prescribed by Cap Cities/ABC.

To evidence this conduct, the Declaration of David D. Kinley, owner and operator of Sun Country Cable, a small operator in the San Francisco, California area is attached[15]. As stated in the Declaration, Sun Country was unable for financial and technical reasons to

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[14]The decision regarding whether or not consent is required is at the election of the broadcast station. (47 U.S.C. Section 325(b)(1)(B)).

[15]Exhibit A.

add ESPN2 to its lineup. Consequently, retransmission consent for KGO, the owned and operated station licensed to San Francisco, was never granted by Cap Cities/ABC, forcing Sun Country to drop its signal.

While for purposes of this *Petition* a singular declaration is included as proof[16], the Commission must understand that many small operators capitulated to the demands of Cap Cities/ABC and entered into retransmission consent agreements. As part of the agreements required by broadcasters, strict confidentiality prohibitions were included that prohibit most operators from divulging the terms and providing support for this filing. Small cable is caught in a double bind that will surely worsen if the license transfers are granted.

The Commission has the ability to require Cap Cities/ABC to divulge, as part of the license transfer review process, gross data involving the types of retransmission consent agreement provisions it entered into with operators without breaching the confidentiality provisions of the agreements. Without compulsory production of this data, Cap Cities/ABC will be allowed to extract significant concessions from small cable operators while imposing confidentiality covenants. Small cable operators will be unable to seek relief from the appropriate enforcement agency -- this Commission.

b. Cap Cities/ABC Has Refused To Deal With Small Operators On Parity With Large Operators.

Cable programming services owned in part by Cap Cities/ABC force small operators to pay significantly higher rates than they charge large operators. For example, the rates

[16]As discussed in this *Petition*, even if the Commission does not find a singular declaration fully determinative, it certainly gives rise to probable cause warranting further discovery by the Commission.

charged for ESPN are 29% higher for small versus large operators[17]. For Lifetime, the disparity is twice as great at 60%[18].

The price disparity between small and large operators, whether or not cost-justified, can be somewhat mitigated by having smaller operators form buying consortiums to obtain rates typically accorded larger operators. Only one such buying consortium exists in the U.S., the National Cable Television Co-operative ("NCTC"). Many members of SCBA are also members of NCTC.

Certain programmers, however, for whatever reason, refuse to deal with NCTC. Of the key programmers refusing to deal with NCTC, two thirds are owned in part by Cap Cities/ABC and Disney[19].

The Commission has outlined legitimate reasons that could conceivably prevent program providers from contracting with SCBA members and buying consortiums. These include the possibility of: (i) parties reaching an impasse on particular terms; (ii) history of

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[17]*Supplemental Comments in Further Support of Interim Benchmark Adjustments for Low Density and Smaller Cable Operators*, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Rate Regulation, FCC MM Docket No. 92-266 (filed February 15, 1994) at Exhibit D (monthly cost per subscriber of ESPN for small operator is $0.54 while for large operator cost is only $0.42) ("*SCBA Supplemental Comments*")

[18]*Id* (the monthly per subscriber cost of Lifetime for a small operator is $0.35 for a small operator and $0.14 for a large operator).

[19]SCBA has identified six programmers who, in its opinion, are unreasonably refusing to sell to the NCTC. Of those six, four are owned in part by Capital Cities/ABC and Disney (The Disney Channel, ESPN, A&E and Lifetime). *Reply Comments of the Small Cable Business Association*, In the Matter of Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming, FCC CS Docket No. 95-61 (filed July 28, 1995) at 6 ("*Reply Comments*"). (Exhibit B).

defaulting on other programming contracts; or (iii) a preference not to sell in a particular area[20]. None of these legitimate reasons exist to justify the refusal of the Cap Cities/ABC and Disney owned services to deal with NCTC.

NCTC already assumes responsibility for billing all members and sending one payment along with a complete report covering all systems to video program providers. There is no valid reason for concern of financial performance by the NCTC. The NCTC has never defaulted on other programming contracts. Similarly, it is impossible for the parties to have reached an impasse on a particular term since these programming providers have refused to even negotiate with NCTC[21]. Finally, since NCTC members include small cable operators nationwide, there can be no justification for the programmers to refuse to sell based upon a particular service area. Rather, large cable operators, and other providers such as DBS, have used their market power to obtain huge programming discounts from program providers that place small cable operators at a distinct competitive disadvantage.

Long-standing refusals to deal by the existing stand alone-entities of Cap Cities/ABC and Disney have harmed small cable operators and their subscribers. Operators are forced to pay significantly higher costs, which are by necessity passed on to consumers, or the operators and subscribers forego desired programming. Only a handful of programmers

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[20]*First Report and Order*, In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage, MM Docket No. 92-265 (released April 30, 1993) at Par 116 ("*First Report and Order*").

[21]*See, e.g.,* July 27, 1993 Letter of Edwin M. Durso of ESPN to Michael L. Pandzik NCTC President stating "ESPN does not choose to negotiate a master agreement with NCTC." (Emphasis added) (Exhibit C).

refuse to sell to NCTC. Nevertheless, these small operators, individually or together, are powerless to stop such conduct. Given that the combination of the entities will create the largest media company in the world, and that this company will have access to a broadcast network and 25% of U.S. television households over its ten owned and operated stations -- twice the penetration achieved by over 7,000 small cable systems[22] -- any hope of small operators to bring an end to such disparate treatment will be dealt a fatal blow.

4. The Combined Entity Will Have Unique Control Over Both Broadcast And Cable Programmers Allowing Expansion Of Harsh And Disparate Treatment Of Small Operators.

a. "Joint Maneuvering" Of Channels

The combined entity, as the largest media company in the world, will be uniquely positioned to continue to impose harsh and disparate burdens on small cable systems. The record cited above, including the various filings with the Cable Services Bureau of this Commission, documents such treatment. Such treatment may not be prohibited under current law. Nevertheless, it is the statutory charge of this Commission in the instant license transfer application to determine whether the proposed transfers are in the public interest, convenience and necessity[23]. The license transfers are clearly *not* in the public interest.

If the proposed license transfers are approved, the resulting broadcast and cable programmer will be able not only to expand its past conduct, but, as admitted by the parties themselves, be able to engage in "joint maneuvering" of all channels in terms of affiliate

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[22]*Eleventh Order on Reconsideration* at Par. 33. ("66% of all cable systems will meet the expanded definitions of a small system owned by a small company. These systems serve only about 12.1% of the nation's subscribers.")

[23]47 U.S.C. Section 310(d).

sales[24]. Consequently, the concessions to be extracted from small operators will necessarily increase, harming not only cable operators, but their subscribers, by either imposing higher costs or denying access to programming, including broadcast programming, entirely.

The issue is not limited to the availability or cost of cable television programming, but equally as important, the availability of the local off-air signals to cable consumers. Limiting the discussion to the owned and operated stations, which are the subject of the instant application[25], SCBA members within their Arbitron Areas of Dominant Influence ("ADI")[26], must obtain consent to retransmit the signals of the stations by October 6, 1996. Given the tying arrangements required[27] as a precondition to granting consent during the current retransmission consent period[28], coupled with the immense market power of the combined entity, the combined entity will be in a position to extract more costly concessions from these operators.

b. Impairment Of Cable's Ability To Serve The Local Interest

Based on the record of the parties, accelerated disparate and harsh terms of adhesion are virtually certain. Small operators are concerned they will be vulnerable to the "joint

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[24]*Supra* at 2.

[25]The conduct which is at the root of SCBA's concerns is not limited to the owned and operated stations, but is also present among many of the network's affiliate stations. Nevertheless, for purposes of the instant application, SCBA limits the discussion and the evidence to the owned and operated stations.

[26]The cumulative ADIs are significant given that they reach 25% of U.S. households.

[27]Kinley Declaration, (Exhibit A).

[28]The current retransmission consent period began October 6, 1993 and ends October 5, 1996. 47 U.S.C. Section 325(b)(3)(B).

maneuvering" of channels, including tying arrangements to one or more of the announced ESPN services and/or Lifetime Too and requirements to relocate Disney from a stand-alone service to a basic service[29] if the system desires to carry the signal of the owned and operated broadcast station.

The issues implicated by such maneuvering cut to the heart of a cable operator's editorial discretion to choose the programming that it believes best serves the local interest in terms of content and cost. Furthermore, many small systems serving less densely populated areas have lower channel capacity and simply do not have the ability to add new channels.

c. Impairment Of The Broadcast Licensee To Fully Serve The Local Interest

Equally as important is the inability of the small cable system subscriber to readily view the programming of the local broadcaster. The local broadcaster is by definition and extensive Commission precedent, required to serve the local interest in the programming it chooses and disseminates[30]. The conduct of the separate entities has already impeded this important mission and the combined entity will likely cut off broadcast programming from more subscribers, consequently impairing the proposed licensee's ability to serve the public interest[31].

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[29]*Multichannel News*, August 7, 1995 at 48.

[30]*See, e.g., Sixth Report and Order*, Television Allocations, 41 FCC 148 (1952).

[31]What good is a broadcaster who attempts to serve the public good, but relatively few potential viewers have ready access to the signal?